



**FEDERAL ELECTION COMMISSION**  
WASHINGTON, D.C. 20463

**Trevor Potter, Esquire**  
**Caplin & Drysdale, Chartered**  
**One Thomas Circle, NW, Suite 1100**  
**Washington, DC 20005**

**JUL 22 2009**

**RE: MUR 6147**  
**John McCain 2008, Inc. and**  
**Joseph Schmuckler, in his official capacity as treasurer**

**Dear Mr. Potter:**

On December 17, 2008, the Federal Election Commission notified your clients, John McCain 2008, Inc. and Joseph Schmuckler, in his official capacity as treasurer, of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your clients, the Commission, on July 14, 2009 voted to dismiss this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003).

If you have any questions, please contact Kamau Philbert, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Shonkwiler'.

**Mark Shonkwiler**  
**Assistant General Counsel**

**Enclosure**  
**Factual and Legal Analysis**

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**FEDERAL ELECTION COMMISSION****FACTUAL AND LEGAL ANALYSIS****MUR: 6147**

**RESPONDENT: Kansas City Chiefs Football Club, Inc.  
John McCain 2008, Inc. and  
Joseph Schmuckler, in his official capacity as treasurer**

**I. INTRODUCTION**

**This matter was generated by a complaint filed with the Federal Election Commission by David Raffel. See 2 U.S.C. § 437g(a)(1).**

**The complaint alleges that former Presidential candidate John McCain's 30-second videotaped tribute to American veterans, that the Kansas City Chiefs Football team showed on Arrowhead Stadium's two JumboTron screens during a football game two days prior to the November 4, 2008 Presidential general election, was essentially free publicity for McCain's Presidential campaign and constituted an unreported in-kind contribution from the Chiefs. The tribute was presented prior to the start of the Chiefs' home game against the Tampa Bay Buccaneers as part of the Chiefs' Veterans' Day celebrations.**

**As discussed below, based on the factual circumstances and consistent with the Commission's recent dismissal of MUR 6020 (Alliance for Climate Protection), the Commission exercises its prosecutorial discretion to dismiss this matter.**

**II. FACTUAL AND LEGAL ANALYSIS****A. Factual Background**

**Kansas City Chiefs Football, Inc. ("the Chiefs") is originally a Texas corporation that moved its operations to Kansas City, Missouri in 1963. It operates a professional**

1 football club within the National Football League ("NFL"). The Chiefs' football games  
2 are played at Arrowhead Stadium, which is part of the publicly financed and controlled  
3 Harry S. Truman Sports Complex owned by the Jackson County Sports Complex  
4 Authority, an agent and political subdivision of Jackson County, Missouri. See  
5 [www.icaca.org/generalinformation.aspx](http://www.icaca.org/generalinformation.aspx) (last visited May 6, 2009).

6 As part of the NFL's annual November Veterans' Recognition celebrations, the  
7 Chiefs held its Military Appreciation Day on November 2, 2008 during its only home  
8 game in November before the official November 11, 2008 Veterans' Day holiday. The  
9 Chiefs' Military Appreciation Day was advertised to the public as an opportunity for  
10 current and former members of the United States military and their families to attend an  
11 NFL game at reduced prices, and be honored throughout the game with military tributes,  
12 a "flyover" by military planes, and other military-themed special entertainment. The  
13 military appreciation activities were scheduled throughout the game and included: a  
14 recognition of past, present, and future U.S. Army soldiers; special honors to three  
15 notable veterans; a performance by a local color guard; the national anthem by an Army  
16 sergeant; performance of a military-themed routine by the Chiefs' cheerleaders; a half-  
17 time show featuring a giant United States Flag held by 100 army troops, a tribute to  
18 wounded soldiers, and an Army induction ceremony.

19 As it has done in previous years, the Chiefs recruited high-profile individuals to  
20 pay tribute to current and veteran members of the United States military during the  
21 celebration as a public service. Gene Simmons (of the musical group KISS) and Senator  
22 John McCain were selected to present videotaped tributes to be shown on Arrowhead

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1 Stadium's two JumboTron screens during the pre-game activities.<sup>1</sup> Senator McCain, a  
2 prominent Vietnam War veteran, senior Senator on the Senate Armed Services  
3 Committee, and a strong advocate for military veterans, had previously given tributes to  
4 United States military personnel prior to his 2008 Presidential bid.

5 McCain's 30-second videotaped tribute, which focused on veterans' service to the  
6 country and contained no electoral references, read as follows:

7 Today at Arrowhead, we are honoring the fine men and  
8 women in uniform who have served and continue to serve  
9 this country. The sacrifice that these men and women  
10 make, allow us to enjoy unparalleled personal freedom and  
11 quality of life in the United States of America. We should  
12 honor those who are currently in harm's way defending our  
13 freedom, and the brave families that await their safe return.  
14 And to all those who have returned from overseas -  
15 welcome home.

16  
17 To all men and women serving in our armed forces, to their  
18 families, and to our veterans: you are the best Americans, you are  
19 the bravest among us. What you have done for us, we can never  
20 do for you. But we are mindful of that distinction, and humbled by  
21 it. And our appreciation for your service demands us all to do  
22 what we can, in less trying and less costly circumstances, to help  
23 keep this nation a place and an idea worthy of the hardships,  
24 danger and sacrifices you have born so valiantly for us.

25  
26 Thank you.

27  
28 The Chiefs asserts that McCain's tribute and the other military celebration  
29 activities were prepared and intended only for the game attendees inside Arrowhead  
30 Stadium. Available information shows that the football game was televised on FOX TV  
31 in both the Kansas City metropolitan area and parts of Florida, and that Direct TV

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<sup>1</sup> There were also videotaped messages throughout the game on the JumboTron screens from Chiefs fans serving overseas.

1 subscribers with a subscription to the NFL football package were able to watch the game.  
2 However, it is unclear whether the pre-game tribute itself was televised.

3 The Chiefs invited Senator McCain and other celebrities to participate in its  
4 Veterans' Day celebrations, and accordingly, the Chiefs did not charge Senator McCain  
5 or any other participant a fee in connection with showing the videotaped tribute. The  
6 Chiefs claim that they incurred no additional or incremental costs in showing McCain's  
7 30-second tribute because the JumboTron screens would have remained on during the  
8 celebration regardless. However, the Chiefs did not address whether they incurred any  
9 cost in creating or producing the tribute.

10 **B. Discussion**

11  
12 The Federal Election Campaign Act of 1971, as amended ("the Act"), establishes  
13 limitations, prohibitions, and reporting requirements for contributions and expenditures  
14 made for the purpose of influencing federal elections. Contributions can be monetary or  
15 "in-kind." In-kind contributions include an expenditure made by any person "in  
16 cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate,  
17 his authorized political committees, or their agents," and are subject to the same  
18 restrictions and reporting requirements as other contributions.<sup>2</sup> 2 U.S.C. § 441a(a)(7)(A),  
19 (B)(i); 11 C.F.R. §§ 100.52(d)(1), 109.21(b). The Commission's regulations at 11 C.F.R.  
20 § 109.21 provide that coordinated communications constitute in-kind contributions from

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<sup>2</sup> It does not appear that McCain's tribute qualifies as an independent expenditure, since it did not contain express advocacy under 11 C.F.R. § 100.22(a) or (b). See 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

1 the party paying for such communications to the candidate, candidate's authorized  
2 committee, or political party committee which coordinates the communication.<sup>3</sup>

3 The criteria for a coordinated communication consist of three prongs – payment  
4 by someone other than the candidate or the candidate's authorized committee (or the  
5 political party committee, where applicable); satisfaction of one or more content  
6 standards (which include public communications that reference a clearly identified  
7 candidate within a prescribed period prior to an election); and satisfaction of one or more  
8 conduct standards (which include the candidate's material involvement in decisions  
9 regarding the communication). All three prongs must be met for a communication to be  
10 considered coordinated. 11 C.F.R. § 109.21. Although Respondents concede that the  
11 third prong of the test may be viewed as being met by the candidate's participation in the  
12 tribute, they dispute whether the payment or the content prongs of the test were satisfied  
13 by the JumboTron tribute. The Commission need not reach this analysis.

14 In MUR 6020 (Alliance for Climate Protection), the Commission exercised its  
15 prosecutorial discretion to dismiss allegations that an environmental group had made a  
16 coordinated in-kind contribution by featuring Speaker of the House of Representatives  
17 Nancy Pelosi in broadcast and print communications to call attention to the need for  
18 public action to prevent further climate change. See Commission Certification dated May

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<sup>3</sup> In *Shays v. F.E.C.* ("Shays II"), the U.S. District Court for the District of Columbia held that the Commission's revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. 508 F. Supp. 2d 10 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties' motions for summary judgment). The D.C. Circuit affirmed the district court with respect to, *inter alia*, the current standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. See *Shays v. F.E.C.* ("Shays III"), No. 07-5360, 2008 WL 2388661 (D.C. Cir. June 13, 2008).

1 6, 2009. Although there was information suggesting the advertisement met the test for a  
2 coordinated communication, the Commission concluded that even if the advertisement  
3 met the coordinated communication standards, under the overall circumstances, further  
4 enforcement action would not be a prudent use of the Commission's limited resources.  
5 See MUR 6020, Statement of Reasons of Chairman Steven T. Walther, Vice Chairman  
6 Matthew S. Petersen, and Commissioners Cynthia L. Bauerly, Caroline C. Hunter, and  
7 Donald F. McGahn II.

8 The overall combination of circumstances in this matter is similar to those in  
9 MUR 6020. The tribute was part of a larger NFL sponsored Veterans' Day program at  
10 Arrowhead Stadium that honored American military personnel. The tribute did not  
11 mention McCain's personal military service or contain any words that could be viewed as  
12 promoting or supporting his candidacy. Further, there is no information showing that  
13 McCain, one of the country's most prominent veterans, was selected to present the tribute  
14 based on his Presidential bid.

15 Accordingly, the Commission exercises its prosecutorial discretion to dismiss this  
16 matter and close the file. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

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